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FREEDOM OF INFORMATION ACT REQUEST

Submitted via email FOIA online

**RE: Freedom of Information Act Request regarding
American Petroleum Environmental Solutions, Inc.
11535 North Force Avenue, Portland, Oregon 97217**

Dear FOIA Officer:

This request is sent by Earthrise Law Center ("Earthrise") on behalf of the Northwest Environmental Defense Center ("NEDC") and Neighbors for Clean Air ("NCA") pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.*

NEDC is a nonprofit environmental organization with its principal place of business in Portland, Oregon. It is an independent organization that was established by a group of professors, law students and attorney alumni at Lewis and Clark Law School in 1969. NEDC is comprised of citizens, attorneys, law students and scientists. NEDC's mission is to protect the environment and natural resources of the Pacific Northwest by providing legal support to individuals and grassroots organizations with environmental concerns, and by engaging in education, advocacy and litigation independently and in conjunction with other environmental groups.

NCA is a nonprofit environmental organization with its principal place of business in Portland, Oregon. Its mission is to create a healthier Oregon through the reduction of air pollution. NCA's goals are to educate, motivate and activate citizens in efforts to improve air quality in Portland and Oregon; to collaborate with our elected officials to promote regulations and policies that best protect public health, including children; to work with businesses subject to air quality regulation and provide opportunities for dialogue about their efforts to reduce emissions and the results of those efforts; and to continue to build a coalition of likeminded individuals and organizations to strengthen our public voice.

A. Requested Records

NEDC and NCA request copies of the following records related to the oil refinery and related buildings, structures, and facilities owned and operated by American Petroleum Environmental Solutions, Inc. at 11535 North Force Avenue, Portland, Oregon 97217 (“APES” or the “Facility”). Further, the terms “Facility” or “APES” shall include American Petroleum Environmental Solutions, Inc. and any of its subsidiaries, divisions, officers, directors, managers, employees, contractors, trustees, partners, successors, assigns, attorneys, and agents, as applicable.

For purposes of this request, “documents, records and materials” should be interpreted to include copies of all correspondence, including, but not limited to, internal memoranda, memoranda and correspondence with any other federal or state agency and staff or individuals, papers, maps, data, scientific (lab and field) studies, samples, schematics, field notes/reports, telephone logs, phone calls, briefing/application documents, e-mail, cell phone records, text messages, instant messages, scheduling notes, meeting minutes and materials, other correspondence among meeting attendees or those who scheduled meetings and notes documenting any communication (regardless of physical form or characteristics). This includes correspondence via personal or unofficial e-mail accounts, and other unofficial communication mediums.

Unless otherwise noted, NEDC and NCA request records for the five-year period preceding the date of this request, i.e., records dated on or after November 10, 2011.

Clean Air Act Compliance Records

1. All records received by EPA in response to EPA’s Clean Air Act section 114 information request sent to Mr. Michael P. Mazza on behalf of APES, dated April 5, 2016;
2. All records received by EPA in response to EPA’s Clean Air Act section 114 information request sent to Mr. Michael P. Mazza on behalf of APES, dated May 25, 2016;
3. All records relating to APES’ Clean Air Act compliance status, including but not limited to documents related to APES’ compliance with:
 - a. Oregon Standard Air Contaminant Discharge Permit No. 26-3021-ST-01;
 - b. The Institutional / Commercial Boiler Area Source NESHAP;
 - c. NSPS for Small Industrial-Commercial-Institutional Steam Generating Units at 40 C.F.R. Part 60, subpart Dc.

4. Results of any sorbent tube analyses, stack tests, or other similar emissions tests or analyses conducted by APES;

Toxic Substances Control Act Compliance Records

5. All records relating to APES' receipt, storage, transport, handling, and disposal of liquid PCBs, PCB bulk product waste, or PCB items, as those terms are defined in 40 C.F.R. § 761.3;
6. All records relating to APES' compliance with the prohibitions and requirements for handling and disposal of used oil containing quantifiable levels of PCBs at 40 C.F.R. § 761.20(e);
7. All records relating to APES' compliance with EPA's PCB storage requirements at 40 C.F.R. § 761.65;
8. All records relating to APES' compliance with EPA's PCB incineration requirements at 40 C.F.R. § 761.70;

General Compliance Records

9. All records relating to any compliance inspection performed by EPA of the Facility under EPA's Clean Air Act or Toxic Substances Control Act authorities, including any reports, notes, photographs, laboratory results, or similar records;
10. All correspondence or communications with APES and/or DEQ regarding any of the topics identified in numbers 1 through 5, above, including any records or documents received from APES and/or DEQ.

B. Exempted and nonexistent documents

Please include in your response an explanation of which documents, if any, may be privileged or exempt from this FOIA request and why. 40 C.F.R. § 2.104(f). If you should seek to prevent disclosure of any of the requested records, please justify your refusal by referring to the specific exemption that you are invoking under the FOIA. *Id.* § 2.104(h)(2). Also, please provide those portions of the documents with information request that are not specifically exempted from disclosure. If the documents do not exist, please indicate that in your written response. We reserve the right to appeal any denial. *Id.* § 2.104(j).

C. Request for Expedited Processing

NEDC and NCA request that you respond to this request immediately as there is an urgent need for them to inform the public about the nature of the Facility's emissions and

compliance status as well as the scope and results of EPA's inspections, investigation requests, and other compliance efforts. 40 C.F.R. § 2.104(e)(1)(ii). As EPA is well aware there is great public interest in this facility, given its proximity to a residential area on Hayden Island and the ongoing nuisance odors and other harmful impacts suffered by nearby residents. The ongoing emission of toxic air pollutants from the Facility and its past and present handling of contaminated waste oil (among other substances) presents the risk of significant environmental harm. Therefore, the prompt release of the information requested herein is paramount.

D. Request for Fee Waiver

NEDC and NCA request that you waive all fees in connection with this request. FOIA carries a presumption of disclosure and the fee waiver was designed specifically to allow nonprofit public interest groups, such as NEDC and NCA, access to government documents without the payment of fees. Federal courts have stated that FOIA "is to be liberally construed in favor of waivers for noncommercial requesters." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)). *See also Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003). As shown below, NEDC and NCA meet FOIA's two-pronged test for a fee waiver because disclosure of the requested documents is both in the public interest and not primarily in the commercial interest of NEDC or NCA. 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l).

- 1. Disclosure of this information is in the public interest because it will significantly contribute to public understanding of the operations or activities of the government.**

NEDC and NCA qualify for a fee waiver because the requested information is likely to significantly contribute to the public understanding of government operations or activities. Under FOIA the fee associated with the document production is waived if the release of the information is in the "public interest." 5 U.S.C. § 552(a)(4)(A)(iii) ("documents shall be furnished without any charge . . . if disclosure of the information is in the public interest"). Pursuant to EPA's implementing regulations at 40 C.F.R. § 2.107(l)(1)(c), EPA must consider whether (1) the subject of the request concerns the operations or activities of the government; (2) disclosure is "likely to contribute" to an understanding of government operations or activities; (3) disclosure will contribute to public understanding of a reasonably broad audience of persons interested in the subject; and (4) the resulting contribution to public understanding of government operations or activities is likely to be significant. Because disclosure of the information NEDC and NCA request herein meets these four factors, disclosure is in the public interest and NEDC and NCA should be granted a fee waiver.

- a. The subject of NEDC and NCA's request directly and clearly concerns "the operations or activities of the government."**

NEDC and NCA's request concerns the operations and activities of the government. 40 C.F.R. § 2.107(l)(2)(i). The requested documents relate to EPA's actions under the Clean Air Act (CAA) and the Toxic Substances Control Act (TSCA) to ensure the protection of the environment and human health. Whether the Facility is in compliance with EPA's regulations under those statutes and the actions EPA has taken or may take to determine the Facility's compliance status are precisely the type of agency operations and activities contemplated by the FOIA fee waiver provision.

- b. Disclosure of the requested information is "likely to contribute" to an understanding of government operations or activities.**

The information requested by NEDC is likely to contribute to an understanding of government operations and activities. 40 C.F.R. § 2.107(l)(2)(ii). To the best of NEDC and NCA's knowledge, the requested information is not already in the public domain. The information contained in the requested documents will provide an otherwise unavailable window regarding EPA's implementation of its authorities under the CAA and TSCA. This information will not only allow the public to understand the results of EPA's compliance investigation activities, but will provide the public the opportunity to review EPA's process for initiating such activities and determining what remedial steps, if any, are warranted at the Facility. Such information is critical for the public to be assured that the CAA and TSCA are being implemented as Congress intended. Thus, the requested communications and determinations regarding the process for and results from the facility inspection will be "meaningfully informative" about EPA's operations and activities.

- c. Disclosure of the information requested by NEDC and NCA will contribute to public understanding of the subject.**

The requested information will contribute to public understanding of the subject. Information that could "support oversight of [an agency's] operations" is the type of information that Congress considered to have a "high potential for contribution to public understanding." *McClellan Ecological*, 835 F.2d at 1286. In furtherance of their missions to protect the environment and natural resources of the Pacific Northwest through education, advocacy, and litigation, and to reduce air pollution and its associated public harms, NEDC and NCA have an interest ensuring that the federal and state agencies charged with protecting the environment and human health are taking the necessary and appropriate steps as required by law. Both NEDC and NCA intend to analyze the documents provided to ensure that EPA is appropriately monitoring and investigating the Facility's CAA and TSCA compliance and intend to provide the public with the information regarding the Facility's impacts to local and regional air quality.

After reviewing the information provided, NEDC and NCA intend to use its resources and expertise to inform and educate volunteers, members and supporters about the interactions regarding the inspection of the facility. Both NEDC and NCA are comprised of professionals with scientific and legal expertise who regularly write, speak, and teach on environmental compliance and other issues regarding environmental quality in the Pacific Northwest. NEDC and NCA are uniquely qualified to disseminate the requested information to a “reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(l)(2)(iii). NEDC, long known for its leadership role in ensuring agency compliance with federal law, uses a combination of education, research, and advocacy to inform the public on how government actions impact Oregon’s and Washington’s precious natural resources. NEDC will draw on its expertise and existing connections to the community in the Portland metro region and throughout the Pacific Northwest to disseminate this information. For its part, NCA is viewed as a regional leader on air quality issues in the Portland metro area and has developed a broad following and reputation for excellent work regarding air toxics.

The information will be disseminated to the public through NEDC and NCA’s websites (www.nedc.org and www.whatsinourair.org), social media outlets such as Facebook, electronic news bulletins, print newsletters, and other publications, all of which are available free of charge to interested parties. *See Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 814 (2d. Cir. 1994) (observing that the relevant inquiry is “whether [the] requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject”). *See also Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005) (finding requester’s publication of online newsletter and intent to create website using requested records, among other things, sufficient for dissemination purposes). By analyzing the requested information and then disseminating the results among NEDC and NCA’s hundreds of members, as well as sharing the information with other nonprofit organizations working on air quality and hazardous waste issues in the Pacific Northwest, “disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester.” 40 C.F.R. § 2.107(l)(2)(iii). Hence EPA’s disclosure of the information requested by NEDC and NCA will contribute to public understanding of the subject.

d. The disclosure will contribute “significantly” to public understanding of government operations or activities.

Disclosure of records pertaining to EPA’s investigation, enforcement, and interpretation of the CAA and TSCA is likely to “significantly” contribute to public understanding of EPA’s operations and activities in the Pacific Northwest. *Id.* § § 2.107(l)(2)(iv). The disclosure of process EPA used to conduct this inspection and the result of the inspection will contribute to public knowledge that did not exist pre-disclosure. None of the requested information is currently available to the public.

NEDC and NCA’s subsequent analysis and dissemination of this information to the public will increase public understanding to a significant extent *See Ctr. For Biological Diversity v.*

OMB, 546 F. Supp. 2d 722, 731 (N.D. Cal. 2008) (granting a fee waiver because “[m]ere knowledge of the weight [the OMB placed upon greenhouse gas emissions when it conducted its analysis] will significantly increase the public’s understanding”). NEDC has a consistent record of significantly increasing public understanding of the effects of federal agency action on protecting the environment.

2. NEDC has no commercial interest in the requested information.

The second element of the fee waiver analysis addresses the requester’s “commercial interest” in the information. To determine if the request is made primarily for the commercial benefit of the requester, EPA’s regulations examine two relevant factors. 40 C.F.R. § 2.107(l)(3).

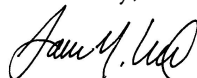
The first factor considered is “whether the requester has a commercial interest that would be furthered by the requested disclosure.” *Id.* § 2.107(l)(3)(i). As 501(c)(3) nonprofit, tax-exempt organizations, neither NEDC nor NCA has any commercial, trade or profit interest in the material requested. NEDC and NCA will not be paid for, or receive other commercial benefits from the publication or dissemination of the material requested. Therefore, NEDC and NCA do not seek this information for any use that furthers a commercial interest.

The second factor hinges on “the primary interest in the disclosure.” *Id.* § 2.107(l)(3)(ii). The identified commercial interest cannot be significantly more substantial than the public interest. *Id.* Because NEDC and NCA have no commercial interest whatsoever in the information requested, even a modest public interest will tip the balance in favor of a fee waiver. Here, there is great public interest in the release of the materials sought because they will provide previously unavailable information regarding EPA’s enforcement of the CAA and TSCA and the potential impacts of this Facility on the environment and human health. Thus, assuming *arguendo* that NEDC and NCA have some “commercial” interest in the documents requested, a complete fee waiver would still be appropriate because NEDC’s primary interest in the material is to inform the public about the operations and activities of EPA that affect the environmental quality in Oregon. Therefore, the disclosure of the information is not “primarily in the commercial interest of” NEDC, and a fee waiver is appropriate.

E. Conclusion

Thank you for your time and attention in this matter, and I look forward to hearing from you shortly. If you have any questions, feel free to contact me at (503) 768-6929.

Sincerely,



James N. Saul